NOVA SCOTIA COURT OF APPEAL

Citation: Nova Scotia Government and General Employees Union v. Nova Scotia (Transportation and Infrastructure Renewal), 2010 NSCA 85

Date: 20101103
Docket: CA 324157
Registry: Halifax

Between:

Nova Scotia Government and General Employees Union

Appellant

v.

Her Majesty the Queen in the Right of the Province of Nova Scotia, representing the Department of Transportation and Infrastructure Renewal

Respondent

Judges: Saunders, Hamilton, and Beveridge, JJ.A.

Appeal Heard: September 29, 2010, in Halifax, Nova Scotia

Held: Appeal dismissed

Counsel: David J. Roberts, for the appellant
Dana F. MacKenzie and Leanne Hosfield, Articled Clerk, for the respondent

Reasons for judgment:

[1] The appellant, the Nova Scotia Government and General Employees Union (NSGEU), appeals the decision of David P. S. Farrar, J., as he then was (2010 NSSC 15), which held that Adjudicator William H. Kydd, Q.C. erred in finding he had jurisdiction to determine the rate of pay for a new or substantially altered job classification created by the respondent, the Province of Nova Scotia (Province).

Facts

[2] The background facts are clearly set out in the judge's reasons for judgment:

> [1] The Applicant, the Province of Nova Scotia (the Province) seeks judicial review and, in particular, an order in the nature of *certiorari* quashing the August 5, 2009, decision of William Kydd, Q.C. (the adjudicator).
>
> **Background**
>
> [2] The Province and the Respondent, Nova Scotia Government and General Employees Union (NSGEU) are parties to a collective agreement referred to as the Civil Service Master Agreement (the Agreement). It contains provisions relating to the classification and pay rates applicable to various positions in the Civil Service. Article 40.01 of the Agreement is at the heart of this dispute and provides:
>
> > (a) When a new or substantially altered classification covered by this Agreement is introduced, the rate of pay shall be subject to negotiations between the Employer and the Union. The Employer may implement a new classification and attach a salary to it, providing that the Union is given ten (10) days' written notice in advance.
> >
> > (b) If the parties are unable to agree on the rate of pay for the new or substantially altered classification, the Union may refer the matter to a single Adjudicator, established in accordance with Section 35 of the Civil Service Collective Bargaining Act, who shall determine the new rate of pay.
> >
> > (c) The new rate of pay shall be effective on the date agreed by the parties or the date set by the Adjudicator but, in any event, not earlier than the date of implementation of the classification.

[3] On August 3, 2005, by letter to the Nova Scotia Public Service Commission, the NSGEU filed a grievance claiming the Province had breached the Agreement when it created the position of Maintenance Supervisor in the Department of Transportation and Public Works.

[4] Not unexpectedly, by letter dated September 6, 2005, the Province denied any breach of the Agreement.

[5] On March 21, 2007, William H. Kydd, Q.C., was appointed, by consent of the parties, as a single adjudicator with respect to the grievance in accordance with Section 34(2) of the **Civil Service Collective Bargaining Act** (the Act). The hearing of the grievance took place on October 24, 25 and 26, 2007. The adjudicator issued his decision on February 22, 2008.

[6] Although the original decision of the adjudicator is not challenged in these proceedings, it is instructive to see how the adjudicator identified the dispute before him. At page 2 of the decision the grievance is identified as follows:

> This case concerns a policy grievance in which the Union alleges that the Employer introduced a new classification or substantially changed an existing classification to the extent that the Employer was required to recognize that there was a new classification. The Union submits the Employer breached the collective agreement by failing to negotiate a pay scale for the new classification.

[7] In keeping with the wording of Section 40.01 of the Agreement, the adjudicator correctly identified the issues before him as whether a new classification was created and if so, whether there was an obligation on the Employer to negotiate a new rate of pay.

[8] The conclusion of the adjudicator is found at page 25 of his decision:

> I find that the Maintenance Supervisor and Operations Supervisor positions were substantially and qualitatively different in their core duties from the jobs in the Supervisor Maintenance classification, and from any of the other existing classifications, and I therefore find that they qualify as a new or substantially altered classification within the meaning of Article 40.01(a).
>
> I therefore declare that the Employer breached Article 40.01(a) by failing to negotiate a new rate of pay. I further declare that the rate of pay shall be

> subject to negotiations between the Employer and Union and that failing agreement, the Union may refer the matter to adjudication pursuant to Article 40.01(b).
>
> [9] The parties entered into negotiations for a new pay rate, however, were unable to agree on the rate of pay for the new or substantially altered classification. As a result, the NSGEU requested that the adjudicator adjudicate that issue in accordance with Article 40.01(b) which, as previous[ly] set out, allowed for the matter to be referred to a single arbitrator in accordance with Section 35 of the **Civil Service Collective Bargaining Act** to determine the new rate of pay.
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> [10] The Province objected to the adjudicator being appointed as an adjudicator for the purposes of determining the rate of pay. The Province objected, not only to him being the adjudicator, but also objected to him ruling on his own jurisdiction. The Province agreed to argue the jurisdictional issue before the adjudicator without attorning to his jurisdiction to do so.
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> [11] The hearing to address the wage rate jurisdictional issue took place on June 3, 2009 and, by decision dated August 5, 2009, the adjudicator found that he had jurisdiction to act as adjudicator and to determine the appropriate pay level pursuant to Article 40.01(b). It is from the adjudicator's August 5, 2009 decision that the Province seeks judicial review.

[3] After determining that he should review the adjudicator's decision applying the correctness standard of review, the judge found that the arbitrator erred and set aside his decision. The judge concluded that the adjudicator placed too much emphasis on the deeming provision in s. 33(2) of the **Act** which did not assist in determining if he had jurisdiction. The motions judge found that the adjudicator erred in finding his March 21, 2007 appointment was broad enough to give him jurisdiction to determine the pay rate issue and in ignoring the Province's right under s. 34(2) of the **Act** to consent to the appointment of an adjudicator to determine the rate of pay. He also found the arbitrator erred in deciding he had the authority to even make the inquiry about whether he had jurisdiction.

[4] On the issue of s. 33(2) the judge wrote:

> [22] The adjudicator in his decision, in particular at page 4, places considerable emphasis on the deeming provision in Section 33(2). The deeming provision provides:
>
>> Where a difference arises between the parties relating to the interpretation or application of this agreement, including any question as to whether or not a matter is adjudicable within the meaning of subsection (4) of Section 33 of the **Civil Service Collective Bargaining Act**, or where an allegation is made that this agreement has been violated, either of the parties may, after exhausting any grievance procedure established by this agreement, notify the other party in writing of its desire to submit the difference or allegation to adjudication.
>
> [23] I have difficulty in understanding how that provision in any way assists the adjudicator in the determination of his jurisdiction in this case. The matter which was in dispute between the parties was whether a new or substantially altered position had been introduced. The remedy which flows from the determination that a new position had been introduced by the Province is for the parties to negotiate. The adjudicator decided the grievance in the NSGEU's favour and declared that the rate of pay was subject to negotiations. There was nothing about the adjudication before him which required a determination of any other issue.

[5] On the reliance the adjudicator placed on his March 21, 2007 appointment for jurisdiction to decide the rate of pay issue, the judge reasoned:

> [24] The adjudicator interpreted the letter of appointment as being broad enough to provide him with the ability to determine the rate of pay for the new or substantially altered classification. However, the adjudicator ignores the fact that the issue before him was the determination of breach of 40.01(a). No issue arises under 40.01(b) until such time as three things occur:
>
> 1. Breach of Article 40.01(a):
> 2. A determination that there has been a breach of Article 40.01(a):
> 3. The parties have been unable to negotiate a new rate of pay for the substantially altered position.
>
> [25] There may never be a need to have an adjudication under 40.01(b) if the negotiations are successful. The adjudicator is assuming that he could be given jurisdiction over an issue which has not yet arisen. Indeed, it could not form part

of the original grievance as the determination of a breach of Article 40.01(a) had not yet occurred and the negotiations had not failed.

...

[27] The adjudicator erred in determining that jurisdiction to determine the issues arising under 40.01(a) allowed him to also determine the issues under 40.01(b) when those issues were not before him and indeed, may never have arisen.

...

[29] As noted above, the result of a violation of Article 40.01(a) is a requirement that the parties negotiate a new rate of pay for the relevant group of employees. Article 40.01(a) is not an automatic right to a wage rate hearing.

[6] With respect to the significance of consent, the judge wrote:

[31] The Act establishes a series of prerequisites for the vesting of jurisdiction in an adjudicator, they are

1. The exhaustion of the grievance procedure (Section 36(1))

2. Consensual selection by the parties, which is formalized through an appointment by the Civil Service Employee Relations Board (Section 34(2)). Alternatively, in the absence of agreement the adjudicator is selected and appointed by the Civil Service Employee Relations Board (Section 34(3)).

[32] In this circumstance the exhaustion of the grievance procedure is not a prerequisite for the appointment of an adjudicator. Under Article 40.01(b), it is an inability to reach an agreement that triggers the appointment of an adjudicator, not anything that comes up with respect to the determination of the rights of the parties under the Agreement or the interpretation of a grievance. The Province has the right to consent to the individual doing the adjudication of the wage rate, if the matter is to be heard by a single adjudicator (s. 34(2)).

[7] After referring to **Re London (City) and C.U.P.E. Local 101** (2006), 148 L.A.C. (4th) 337, where the arbitrator declined to assume jurisdiction over a second grievance, the judge further noted:

> [35] Similarly, the issue under Article 40.01(b) arose (and could only arise) after the original grievance was determined and dispensed with by the adjudicator. The right to consent to the adjudicator is a significant right in the labor relations context and it is not one to be taken away lightly. The Province did not consent to the adjudicator acting as the wage rate adjudicator; by determining he had jurisdiction, absent that consent, the adjudicator erred.

Issues

[8] The appellant raises three issues on this appeal:

1) Did the judge err when he selected the standard of correctness to review the decision of Adjudicator Kydd?

2) Did the judge err when he found the adjudicator committed a reviewable error when he concluded he had jurisdiction to determine the rate of pay for Maintenance Supervisors?

3) Did the judge err when he found the adjudicator committed a reviewable error when he entered into an inquiry about whether he had the jurisdiction to set a rate of pay for Maintenance Supervisors?

[9] I make no comment on the third issue because I am satisfied the judge did not err on the first two issues, and I would dismiss the appeal.

Standard of Review

[10] I agree with the parties that the standard of review this Court is to apply when reviewing the judge's decision on the first two issues is correctness.

First Issue

[11] The real thrust of the appellant's first argument is that the judge erred by characterizing the issue before the adjudicator as a "true question of jurisdiction or vires" and then deciding to apply the standard of correctness, without first carrying out the standard of review analysis required by **Dunsmuir v. New Brunswick**, 2008 SCC 9, [2008] 1 S.C.R. 190; [2008] S.C.J. No. 9 (Q.L.).

[12] In deciding what deference he should give to the adjudicator's decision, the judge reasoned:

> [14] The applicable standard of review is to be determined in accordance with the analysis established by the Supreme Court of Canada in *Dunsmuir v. New Brunswick* [2008] SCJ No. 9. The decision is conveniently summarized by Fichaud, J.A. in *Police Association of Nova Scotia Pension Plan v. Amherst (Town)* 2008 NSCA 74 at paragraphs 39 - 42.
>
> > 39. Correctness and reasonableness are now the only standards of review (para. 34.) The court engages in a "standard of review analysis", without the "pragmatic and functional" label (para. 63).
> >
> > 40. The ultimate question on the selection of an SOR remains whether deference from the court respects the legislative choice to leave the matter in the hands of the administrative decision maker (para. 49).
> >
> > 41. The first step is to determine whether the existing jurisprudence has satisfactorily determined the degree of deference on the issue. If so, the SOR analysis may be abridged (para. 62, 54, 47).
> >
> > 42. If the existing jurisprudence is unfruitful, then the court should assess the following factors to select correctness or reasonableness (para. 55):
> >
> > > (a) Does a privative clause give statutory direction indicating deference?
> > >
> > > (b) Is there a discrete administrative regime fro(m) which the decision maker has particular expertise? This involves an analysis of the tribunal's purpose disclosed by the enabling legislation and the tribunal's institutional expertise in the field (para 64)
> > >
> > > (c) What is the nature of the question? Issues of fact, discretion or policy, or mixed questions of fact and law, where the legal issue cannot be readily separated, generally attract reasonableness (para. 53). Constitutional issues, legal issues of central importance, and legal issues outside the tribunal's specialized expertise attract correctness.

> Correctness also governs "true questions of jurisdiction or vires", ie. "where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter". Legal issues that do not rise to these levels may attract a reasonableness standard if this deference is consistent with both (1) any statutory privative provision and (2) any legislative intent that the tribunal exercise its special expertise to interpret its home statue and govern its administrative regime. Reasonableness may also be warranted if the tribunal has developed an expertise respecting the application of general legal principles within the specific statutory context of the tribunal"s statutory regime (para. 55-56, 58-60).
>
> [Emphasis in judge's reasons]

[15] A full analysis is not necessary in these circumstances. The adjudicator was clearly deciding a question of jurisdiction. The adjudicator's decision involves a determination of whether the wage rate adjudication fell within his grant of jurisdiction. There are no questions of fact or policy, and no discretions that need to be exercised. It is clear that what he was deciding was a "true question of jurisdiction or vires."

[16] *Dunsmuir*, supra, at paragraph 50 held;

> As important as it is that the courts have a proper understanding of reasonableness review as a deferential standard, it is also without question that the standard of correctness must be maintained in respect of jurisdictional and some other questions of law. This promotes just decisions and avoids inconsistent and unauthorized application of law. When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

[17] The Court in *Dunsmuir* continued at paragraph 59:

> Administrative bodies must also be correct in their determination of true questions of jurisdiction or vires. We mention true questions of vires to

> distance ourselves from the extended definitions adopted before CUPE. It is important here to take a robust view of jurisdiction. We neither wish nor intend to return to the jurisdiction/preliminary question doctrine that plagued the jurisprudence in this area for many years. "Jurisdiction" is intended in the narrow sense of whether or not the tribunal had the authority to make the inquiry. In other words, true jurisdiction questions arise when the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter. The tribunal must interpret the grant of authority correctly or its action will be found to be ultra vires or to constitute a wrongful decline of jurisdiction.
>
> [18] In *Nova Scotia Teachers Union v. Nova Scotia (Minister of Education and Culture)*, [2001] NSJ No. 320 at paragraphs 43 - 45, Kennedy, C.J. addressed the matter squarely at paragraph 44 and 45:
>
> > Either an arbitrator has jurisdiction or he doesn't. He cannot be wrong when he determines that issue.
> >
> > He cannot mistakenly create jurisdiction that he does not have, or in this context, decline jurisdiction on a significant issue that he does have.
>
> [19] Similarly, I conclude that the standard of review to be applied on the adjudicator's decision is correctness.

[13] These reasons satisfy me that the judge followed the analysis required by **Dunsmuir** and summarized in **Police Association**. As he found, the question before the adjudicator was a "true question of jurisdiction or vires" – did his March 21, 2007 appointment give him jurisdiction to adjudicate the pay rate issue? The jurisprudence makes it clear that a "true question of jurisdiction or vires" will always be reviewed on a standard of correctness so that there is no need to engage in a standard of review analysis; **Dunsmuir**, ¶ 59; **United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)**, 2004 SCC 19, ¶ 5; **ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)**, 2006 SCC 4, ¶ 21; **Homburg Canada Inc. v. Nova Scotia (Utility and Review Board)**, 2010 NSCA 24, ¶ 58; **Border Paving Ltd. v. Alberta (Occupational Health and Safety Council)**, 2009 ABCA 37, ¶ 16; **Macdonald v. Mineral Springs Hospital**, 2008 ABCA 273, ¶ 27 and 28; and **Canadian Council for Refugees v. Canada**, 2008 FCA 229, ¶ 57 and 58.

[14] Accordingly, I am satisfied the judge did not err in the process he followed in determining the standard of review he ought to apply to the adjudicator's decision in this case or in his conclusion that the standard was one of correctness.

Second Issue

[15] I am also satisfied the judge did not err in finding that the adjudicator committed a reviewable error when he found he had jurisdiction to determine the rate of pay for Maintenance Supervisors.

[16] As the judge found, the adjudicator's March 21, 2007 appointment only authorized the adjudicator to adjudicate the August 3, 2005 grievance. The only issue raised in that grievance was identified by the adjudicator on page 2 of his February 22, 2008 decision and by the judge in paragraph 6 of his reasons – did the Province breach Article 40.01(a) of the Agreement by introducing a new classification or substantially changing an existing classification without giving the NSGEU ten days written notice in advance. The adjudicator finally decided that issue and ordered the appropriate remedy, that the parties should negotiate. This decision extinguished his authority to arbitrate under the March 21, 2007 appointment, as there was nothing left for the adjudicator to decide, pursuant to the August 3, 2005 grievance.

[17] The pay rate issue did not exist at the time the August 3, 2005 grievance was made. At that time the parties had not commenced negotiations on the pay rate, much less been unable to agree on it – prerequisites to the Article 40.01(b) pay rate issue. Hence, as the judge concluded, the adjudicator was not, and could not have been, appointed on March 21, 2007 to determine the pay rate issue as it did not exist. It was the failure of the parties' negotiations that gave rise to a new rate of pay dispute between the parties, requiring a fresh appointment of an arbitrator pursuant to s. 34 of the **Act**. Such a fresh appointment engages the consent of the parties under s. 34(2), and the Province did not consent.

Conclusion

[18] I would dismiss the appeal, with costs in the amount of $1,500 plus disbursements (as agreed or taxed), payable by the appellant to the respondent.

Hamilton, J.A.

Concurred in:

Saunders, J.A.

Beveridge, J.A.